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No. 06-88

IN THE
Supreme Court of the United States

BAYER CORPORATION AND WYETH,

Petitioners,

v.

JAMES E. ANDERSON, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 49 plaintiffs with claims solely against diverse defendants may improperly join with nine plaintiffs suing four non-diverse defendants for the sole purpose of defeating federal diversity jurisdiction.

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Rochelle Chodock, David Yolkut & Dennis R. Connolly, *"Insuring" the Continued Solvency of Pharmaceutical Companies in the Face of Product Liability Class Actions*, 40 Tort Trial & Ins. Prac. L.J. 997 (2005) 3

Federal Judicial Center, *Manual for Complex Litigation* (4th ed. 2004) 2, 3, 4

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Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience,* 54 Drake L. Rev. 621 (2006) 5

Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network,* 2005 Utah L. Rev. 863 9

14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 3d* § 3723 (1998) 5

15 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice and Procedure: Jurisdiction 2d* § 3868 (Supp. 2006) 3, 4

OTHER AUTHORITY

Administrative Office of the Courts, *Judicial Business of the United States Courts* (2005), *available at* http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf 2

Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-20 (2005), *available at* http://www.uscourts.gov/judbus2005/tables/s20.pdf 3

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Administrative Office of the Courts, *Judicial Facts and Figures* tbl.4.5 (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/Table405.pdf 2

Judicial Panel on Multidistrict Litigation, "Products Liability Litigations," *available at* http://www.jpml.uscourts.gov/Pending_MDLs/Products_Liability/products_liability.html. 2

INTEREST OF AMICUS CURIAE

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a non-profit association that represents more than thirty of the country's leading pharmaceutical research and biotechnology companies.[1] Together, PhRMA members are responsible for researching and developing a huge portion of innovative medicines available to consumers. In 2005 alone PhRMA members invested a combined estimated total of $39.4 billion in discovering and developing new medicines, out of $51.3 billion industry-wide.

Product liability suits are a common fixture of the pharmaceutical industry and continue to balloon in volume. In confronting these suits, PhRMA members, like many mass tort defendants, depend upon the efficiency and procedural safeguards of the federal judicial system. They rely in particular on the federal multidistrict litigation provisions and removal statutes, 28 U.S.C. §§ 1407, 1441, which, taken together, allow PhRMA members to aggregate an otherwise overwhelming caseload and ensure a fair disposition in federal court.

In its cursory opinion rejecting the important procedural doctrine of "fraudulent misjoinder," the Ninth Circuit, perhaps unwittingly, cripples the right of PhRMA members to remove product liability actions to federal court by encouraging plaintiffs in unrelated

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[1] The parties have consented to the filing of this brief and their respective letters of consent have been lodged with the Clerk. In accordance with Supreme Court Rule 37.6, no party authored this brief in whole or in part and no person or entity other than PhRMA or its members contributed monetarily to its preparation or submission. A list of PhRMA members is available at www.phrma.org.

pharmaceutical actions to join together for the purpose of defeating federal diversity jurisdiction. As a result of the Ninth Circuit decision, PhRMA members will be forced to defend in state court thousands of cases that properly belong in federal court, including in multidistrict litigation proceedings, and the decision will therefore frustrate the salutary goals underlying the multidistrict consolidation statute.

STATEMENT

1. The number of mass tort suits against pharmaceutical companies has increased dramatically in recent years, *see, e.g.*, Federal Judicial Center, *Manual for Complex Litigation* § 22.1, at 344 (4th ed. 2004), and now accounts for a substantial percentage of all product liability actions filed nationwide, *see, e.g.*, Administrative Office of the Courts, *Judicial Facts and Figures* tbl.4.5 note (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/Table405.pdf. Pharmaceutical mass tort cases also represent a significant percentage of the cases consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation ("MDL Panel" or "Panel"). *See* Administrative Office of the Courts, *Judicial Business of the United States Courts* 26 (2005), *available at* http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf ("large number" of the 8,874 cases transferred by the Panel during the 12-month period ending September 30, 2005, were "product liability cases involving the arthritis pain medication Vioxx and diet drugs"). Over the last five years, the Panel has ordered at least 17 different multidistrict litigations involving pharmaceutical drugs, including five in the first half of 2006 alone. Judicial Panel on Multidistrict Litigation, "Products Liability Litigations," *available at* http://www.jpml.uscourts.gov/Pending_MDLs/Products_Liability/products_liability.html.

Because of their size, scope, and monumental cost, pharmaceutical mass tort actions "strain the limits of the traditional adversary system," Advisory Committee on Civil Rules and Working Group on Mass Torts, *Report on Mass Tort Litigation* 4 (1999), *as reprinted without appendices in* 187 F.R.D. 293, 298 (1999), and "continue to plague the pharmaceutical industry," *see* Rochelle Chodock et al., *"Insuring" the Continued Solvency of Pharmaceutical Companies in the Face of Product Liability Class Actions*, 40 Tort Trial & Ins. Prac. L.J. 997, 997 (2005).

2. The huge volume of pharmaceutical and other mass tort actions and the resulting tax on judicial resources have created "enormous pressure to aggregate or combine [cases]." *Manual for Complex Litigation, supra*, § 22.1, at 346. The multidistrict litigation statute, 28 U.S.C. § 1407, has been a critically important aggregation tool in addressing the problem of mass torts, litigation that otherwise threatens to swamp the judicial system.[2] *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 416 (E.D.N.Y. 2004) (Weinstein, J.) ("Mass tort actions are especially suited to MDL treatment."); 15 Charles Alan Wright et al., *Federal*

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[2] This has been particularly true in recent years. From 1968, when the Panel was created, to September 30, 1995, a total of 92,555 actions were consolidated for pretrial proceedings under § 1407. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-22 (1997), *available at* http://www.uscourts.gov/judicial_business/s22sep97.pdf. As of September 30, 2005, that number had reached 228,466. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-20 (2005), *available at* http://www.uscourts.gov/judbus2005/tables/s20.pdf. Thus, the average annual number of consolidated actions in the Panel's first 27 years was under 3,500. Over the next 10 years, that number had increased by nearly four times, to more than 13,500.

Practice and Procedure: Jurisdiction 2d § 3868, at 499 (Supp. 2006) (MDLs have a "unique ability to deal effectively with the problem of mass torts.").

In the pharmaceutical context in particular, multidistrict litigation has been an essential case management tool: The most prominent pharmaceutical mass torts -- including those involving the Dalkon Shield (MDL No. 211), Benedictin (MDL No. 486), Fen-Phen (MDL No. 1203), Rezulin (MDL No. 1348), Propulsid (MDL No. 1355), Baycol (MDL No. 1431), Vioxx (MDL No. 1657), Bextra and Celebrex (MDL No. 1699), and PPA (MDL No. 1407), the drug involved in this case -- have all resulted in MDL treatment.

3. The MDL Panel is authorized to transfer only cases pending in federal district courts. *See* 28 U.S.C. § 1407(a). Consequently, the statutory right of defendants to remove cases from state to federal court under appropriate circumstances, *see* 28 U.S.C. § 1441(a), is an essential aspect of multidistrict litigation. When defendants are wrongfully deprived of their removal right, cases that would otherwise be transferred and consolidated under the auspices of a federal MDL are typically left unconsolidated and must remain in various state courts.

Manipulating the federal removal mechanism -- and thus the MDL consolidation process -- by fraudulently misjoining unrelated parties not only deprives defendants of a statutory right; it also exacerbates the problem of mass torts, leading to congestion of state court dockets, delay, and excess costs, and increasing the risk of inconsistent judicial rulings. *Compare Report on Mass Tort Litigation*, *supra*, at 28, *as reprinted in* 187 F.R.D. at 308 ("most fundamental" problem of mass torts is "sheer number of claims"), *with Manual for Complex Litigation*, *supra*, § 22.33, at 367 ("Centralization [under § 1407] serves judicial economy by avoiding duplication of discovery, preventing inconsistent or repetitive rulings,

and conserving the financial resources of the parties, their counsel, and the judiciary.").

To avoid federal jurisdiction and therefore escape MDL consolidation in the mass tort context, plaintiffs often engage in two related practices: forum shopping and fraudulent joinder.[3] It is well documented that mass tort plaintiffs often file suit in a particular state forum because the jurisdiction is perceived to have a pro-plaintiff bias. *See, e.g., Report on Mass Tort Litigation, supra,* at 33, *as reprinted in* 187 F.R.D. at 310 ("A basic pattern, familiar in general practice but more visible in mass torts, involves selection of a court that has proved beneficial to the party choosing the forum."); Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience,* 54 Drake L. Rev. 621, 623-24 (2006) (noting that "plaintiffs' counsel attempt to litigate in [state] jurisdictions with favorable discovery rules, early trial dates, and juries that are receptive to such claims"). To remain in these ostensibly advantageous forums, these plaintiffs frequently "join marginal defendants to defeat federal diversity jurisdiction," *Report on Mass Tort Litigation, supra,* at 34, *as reprinted in* 187 F.R.D. at 310, or misjoin plaintiffs whose claims have no connection to their own, *see In re Prempro Prods. Liab. Litig.*, 417 F. Supp. 2d 1058, 1059 (E.D. Ark. 2006) (noting that in "multi-plaintiff and multi-defendant pleadings" the "non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity").

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[3] As used here, the phrase "fraudulent joinder" includes the concept of fraudulent misjoinder. *See* 14B Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction 3d* § 3723, at 656 (1998) (viewing fraudulent misjoinder as "part of the doctrine of fraudulent joinder").

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Decision Nullifies the Doctrine of Fraudulent Misjoinder

A. The fraudulent misjoinder doctrine has been recognized by two federal circuit courts, numerous district courts, and every scholar to have considered the doctrine in depth, as critical to safeguarding a defendant's statutory right to remove cases from state to federal court. Yet, the Ninth Circuit, with next to no analysis, has jettisoned it as a matter of law. *See* Pet. App. at 3a ("No basis appears in the record *or in our case law* for severing the claims of the eight plaintiffs who have named non-diverse defendants.") (emphasis added).

The Eleventh Circuit first articulated the fraudulent misjoinder doctrine in *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). In that case, the district court severed two putative class actions joined in a single amended complaint, and remanded only the component that involved indisputably non-diverse parties. The Eleventh Circuit affirmed, holding that misjoinder of non-diverse plaintiffs under Federal Rule of Civil Procedure 20 "may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action," *id.* at 1360, as both have the effect of improperly preventing removal to federal court.

The Fifth Circuit has similarly embraced the fraudulent misjoinder doctrine. *See In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) (recognizing "force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction"). Prior to the Ninth Circuit decision in this case, not one federal appeals court had rejected it. *Cf. Calif. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) (assuming without

deciding that Ninth Circuit would accept fraudulent misjoinder doctrine).

In addition, district courts in nearly every federal circuit have recognized the fraudulent misjoinder doctrine as a vital tool in preventing plaintiffs from improperly depriving defendants of their statutory removal right. These courts have relied upon the doctrine especially in the pharmaceutical context, where the practice of conniving to defeat federal diversity jurisdiction is widespread. *See In re Prempro*, 417 F. Supp. 2d at 1059-60; *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 409-13 (S.D. W. Va. 2005); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004); *Jones v. Nastech Pharmaceutical*, 319 F. Supp. 2d 720, 728 (S.D. Miss. 2004); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, 2003 WL 22341303, at *3 (D. Minn. 2003); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001).[4]

Orders requiring that each individual plaintiff file separate, non-aggregated complaints have become an essential aspect of the proper management of large-scale mass torts. These commonplace orders not only help to prevent the misjoinder of parties to manipulate diversity; they also require that individual plaintiffs specify the precise nature of their injury and the parties from whom they seek relief, as well as allow for the orderly consideration and docket administration of each

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[4] For cases outside the pharmaceutical context, see, for example, *Asher v. Minnesota Mining and Manufacturing Co.*, No. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005), *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 817-19 (S.D. Miss. 2002), and *Rudder v. Kmart Corp.*, No. 97-0272-BH-S, 1997 WL 907916, at *5 (S.D. Ala. Oct. 15, 1997).

individual case. Judge Rothstein's Case Management Order No. 15 in this matter is but one of a large number of similar orders in a wide range of MDLs. *See, e.g., In re Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. Aug. 31, 2004) (unnumbered pretrial order), *available at* http://ecf.ared.uscourts.gov; *In re Baycol Prods. Liab. Litig.*, MDL No. 1431 (D. Minn. Jan. 15, 2003) (pretrial order 61), *available at* http://www.mnd.uscourts.gov/Baycol_Mdl; *In re Diet Drugs*, 294 F. Supp. 2d at 679 (pretrial order 2946); *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 428683, at *7 (E.D. Pa. July 17, 1995) (pretrial order 72). The Ninth Circuit opinion would reduce the effectiveness of this crucial practice.

Two recent scholarly treatments of the fraudulent misjoinder doctrine -- and the only ones to have examined the doctrine in depth -- have likewise concluded that the doctrine is essential to the proper application of the federal diversity jurisdiction and removal statutes. *See* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 571, 575 (2006) (describing doctrine as "necessary to protect a diverse defendant's statutory right to remove" and "a vital tool for defendants who desire to litigate in federal court"); Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 780 (2006) (describing doctrine as "vital tool" of federal courts for "polic[ing] joinder gamesmanship").

B. The implications of eliminating the fraudulent misjoinder doctrine are significant and far-reaching. First and foremost, the Ninth Circuit decision will exacerbate the problem of forum shopping in pharmaceutical mass tort actions and encourage plaintiffs' lawyers to misjoin unrelated parties for the sole purpose of defeating diversity jurisdiction.

Numerous courts have held that where, as here, the only common "transaction or occurrence" among plaintiffs is that they have ingested the same drug, joinder is improper.[5] In the underlying litigation in this case, Judge Rothstein, who has been noted for her skill in handling complex mass tort litigation, *see, e.g.*, Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 921-31 (describing PPA MDL court as model of effective mass tort administration), recognized that ingesting a PPA-containing product was insufficient to satisfy Federal Rule of Civil Procedure 20. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash. May 29, 2003) (Case Management

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[5] *See In re Prempro*, 417 F. Supp. 2d at 1060 (finding misjoinder where the "only common thing" among plaintiffs is that they took a hormone replacement therapy drug); *In re Diet Drugs*, 294 F. Supp. 2d at 679 (finding misjoinder "where the only connection among plaintiffs is their use of certain pharmaceuticals"); *In re Baycol*, 2003 WL 22341303, at *4 (finding misjoinder where plaintiffs alleged "injuries suffered as a result of ingesting Baycol, without more"); *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348, 2002 WL 548750, at *2 (S.D.N.Y. Apr. 12, 2002) ("[J]oinder of plaintiffs who have no connection to each other aside from the fact that they ingested Rezulin is misjoinder."); *Simmons v. Wyeth Labs., Inc.*, No. 96-CV-6631, 1996 WL 617492, at *4 (E.D. Pa. Oct. 24, 1996) (finding misjoinder where plaintiffs alleged that they "experienced one or more of numerous injuries and side effects" from using contraceptive Norplant); *In re Orthopedic Bone Screw*, 1995 WL 428683, at *6 (joinder based on claimants having "the same or similar device of a defendant manufacturer implanted in or about their spine" is improper); *see also Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004) ("The mere taking of the *same* prescription drug does not supply plaintiffs with the *same* transaction or occurrence, or *same* series of transactions or occurrences, as required by [Mississippi] Rule 20.") (citing *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004) (en banc)).

Order No. 15), *available at* http://www.wawd.uscourts.gov/mdl. She subsequently denied Respondents' motion to remand, *see In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. MDL 1407 (W.D. Wash. May 5, 2004), *available at* http://www.wawd.uscourts.gov/mdl, and, pursuant to Case Management Order No. 15, each plaintiff was required to file individual complaints. As other courts have done in similar situations, Judge Rothstein has refused to allow the plaintiffs in this case to circumvent the removal statute.

By failing to recognize the doctrine of fraudulent misjoinder and reversing Judge Rothstein, the Ninth Circuit decision not only works an injustice in this case; it also encourages pharmaceutical mass tort plaintiffs to misjoin parties in what the *Tapscott* court called "wholly distinct" cases, 77 F.3d at 1360, expecting that district courts in the Ninth Circuit, including MDL courts, will now be required to remand their cases to state court.

In addition to encouraging "joinder gamesmanship," the Ninth Circuit decision, if followed in other Circuits, will greatly undercut the benefits of multidistrict consolidation. The MDL process, which has become so critical in recent years to handling the problem of mass torts, relies upon the proper administration of the removal process because § 1407 transfers are authorized only from federal court. *See* 28 U.S.C. § 1407(a). With district courts stripped of their ability to sever fraudulently misjoined parties and exercise federal diversity jurisdiction over the remaining cases, § 1407's effectiveness will be significantly hampered.

C. The recent enactment by Congress of the Class Action Fairness Act ("CAFA") of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.), further illustrates the importance of the fraudulent misjoinder doctrine. Designed both to stem the "parade of abuses" committed by plaintiffs' lawyers

and keep interstate class actions out of state court, S. Rep. No. 109-114, at 6 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 7, the Act dramatically expands federal jurisdiction over interstate class actions by relaxing the complete diversity requirement for such actions, *see* 28 U.S.C. § 1332(d), and strengthening the related removal provisions, *see id.* § 1453.[6]

CAFA evidences a strong public policy in favor of resolving complex mass-party litigation in federal court. *E.g., Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicate[] that Congress contemplated broad federal court jurisdiction . . . ."); S. Rep. No. 109-14, at 4, *as reprinted in* 2005 U.S.C.C.A.N. at 6 ("key reason" for problems with class action system "is that most class actions are currently adjudicated in state courts"). The enactment of CAFA reflects the extent to which plaintiffs' counsel have been successful -- primarily through forum shopping and fraudulent joinder -- in keeping interstate class actions out of federal court. *See* S. Rep. No. 109-14, at 10, *as reprinted in* 2005 U.S.C.C.CA.N. at 11 ("In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity."); *id.* at 14-15, *as reprinted in* 2005 U.S.C.C.A.N. at 14 (noting that many class actions are brought in "improbable jurisdictions" and finding that one reason for the

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[6] CAFA also applies to "mass actions," defined in the statute (with certain exceptions) as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i); *see also id.* § 1332(d)(11)(A) ("[A] mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

"dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions").

The fraudulent misjoinder doctrine serves goals similar to CAFA's: combating the gamesmanship of plaintiffs' lawyers and allowing complex multi-plaintiff, multi-defendant litigation to proceed in federal court. In fact, CAFA applies to certain non-class action suits -- so-called "mass actions." *See supra* note 6. However, because a "mass action" is defined in the statute as involving 100 or more plaintiffs, *see id.*, counsel can easily avoid the Act's reach by doing what Respondents in this case have done: fraudulently join fewer than 99 additional plaintiffs. *See* Hines & Gensler, *supra*, at 809 ("In order to escape [CAFA's] liberalized jurisdiction and removal provisions, one suspects that plaintiffs will file ever more joined-but-not-mass actions. And having taken that step to avoid class action and mass action removal under CAFA, it seems likely that many such plaintiffs will also join spoiler parties to defeat ordinary diversity removal."); *see also* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1384 (2005) ("CAFA motivates counsel to otherwise avoid federal subject-matter jurisdiction by joining a large number of multi-state plaintiffs under traditional party joinder rather than the class action device . . . .").

Of course, joining together 100 or more plaintiffs does not *guarantee* treatment under CAFA. But it would be incongruous if removal of a mass pharmaceutical personal injury action could be defeated by the same species of forum manipulation that animated the adoption of CAFA, simply because it involved fewer than 100 plaintiffs. Consequently, a strong fraudulent misjoinder doctrine is an essential complement to CAFA in carrying out Congress's stated goal of preventing procedural

chicanery depriving defendants of their proper removal rights.

II. Cases Involving Fraudulent Misjoinder Rarely Reach the United States Courts of Appeals and Correction of the Doctrine Therefore Depends Upon This Court

The Ninth Circuit decision in this case is likely to have a disproportionate impact because, as detailed below, cases involving fraudulent misjoinder very infrequently reach the federal appeals courts. Because guidance from the Courts of Appeals on the issue of fraudulent joinder is so scarce and it may well be years before the issue is properly presented again, this Court should take this opportunity to provide much-needed clarity on the vitality and applicability of the fraudulent misjoinder doctrine. *See* Percy, *supra*, at 575 (calling appellate review of fraudulent misjoinder doctrine "imperative").

Federal appellate review of cases involving fraudulent misjoinder is extremely rare for two reasons. First, a district court's decision to remand a case to state court is generally not appealable. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."). As a result, federal appellate courts typically cannot correct lower court decisions that either fail to recognize the doctrine of fraudulent misjoinder or that, while recognizing it, apply it improperly.[7]

Second, a district court's refusal to remand a case to state court is not a final appealable order under 28

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[7] Review of remand orders remains possible in civil rights cases, 28 U.S.C. §§ 1443, 1447(d), and in cases remanded for reasons other than lack of subject matter jurisdiction, *San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1121 (9th Cir. 2006).

U.S.C. § 1291. *E.g., Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992) ("The decision to deny the remand clearly does not end the litigation, but merely determines that it will proceed in federal court. In holding that a denial of a motion to remand is not appealable under § 1291, we are in accord with every other federal court of appeals that has addressed this issue."). For this reason, even though review of an order denying remand can still occur, *see Tapscott*, 77 F.3d at 1356 & n.4 (exercising interlocutory jurisdiction under 28 U.S.C. § 1292(b)), it is exceptional.

The Ninth Circuit decision in this case has turned upside-down the critically important doctrine of fraudulent misjoinder. Because the possibility of correction in the federal appeals courts is severely limited, it is an appropriate exercise of this Court's limited certiorari jurisdiction to grant review in this case.

CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court to grant a writ of certiorari to resolve the important question presented herein.

Respectfully submitted,

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